Nos. 329, 330

In the Supreme Court of the United States

OCTOBER TERM, 1950

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, ET AL., PETITIONERS

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, ET AL., PETITIONERS

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL., CARL LUDWIG, H. HERMAN RAUCH, AND MARTIN KLOTSCHE, INDIVIDUALLY AND AS MEMBERS OF A BOARD OF ARBITRATION, AND THE MILWAUKEE ELECTRIC RAILWAY & TRANSPORT COMPANY, A WISCONSIN CORPORATION

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Wisconsin in No. 329 (R. 163–171) is reported at 257 Wis. 43, 42 N. W. 2d 471, and its opinion in No. 330 (R. 235–237) is reported at 257 Wis. 53, 42 N. W. 2d 477. The opinions of the Circuit Court for Milwaukee County in No. 329 (R. 330, 101–118) and in No. 330 (R. 336, 101–106), are unreported.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1257 (3) of Title 28, U. S. C. The petitions for writs of certiorari were granted on November 6, 1950.

QUESTION PRESENTED

The Board's interest in these cases[1] is limited to the single question, namely, whether the provisions of the National Labor Relations Act preclude Wisconsin from absolutely banning strikes in support of lawful economic demands by employees in certain industries subject to the National Act, and requiring employees and labor organizations in such industries to submit dis-

[1] This question is also presented in *United Gas, Coke and Chemical Workers, et al.* v. *Wisconsin Employment Relations Board*, No. 438, certiorari granted, December 11, 1950, and may be reached in *St. John, et al.* v. *Wisconsin Employment Relations Board*, No. 302, probable jurisdiction noted, October 23, 1950. The Board's position as stated herein applies equally to these cases.

putes over wages, hours and working conditions to compulsory arbitration.

STATUTES INVOLVED

The pertinent provisions of the Wisconsin statute, Secs. 111.50–111.65, Subchapter III of Chpater 111 of the Wisconsin Statutes (1949), are set forth in the appendix to the Petition for Certiorari in No. 330. Copies of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. III, 141, *et seq.*) will be made available to the Court.

STATEMENT

The Milwaukee Electric Railway and Transport Company, a privately owned corporation, hereinafter referred to as the Company, is engaged in the business of furnishing streetcar, trolley and motorbus transportation in the city of Milwaukee, Wisconsin (No. 330; R. 163–164; No. 329; R. 101–102, 140). The operations of the Company affect interstate commerce within the meaning of the National Labor Relations Act (No. 329; R. 106–107, 140–141, 163–164).[2] The Company

[2] The Company furnishes transportation service for thousands of employees of commercial and industrial establishments, many of which are engaged in the production of goods for interstate commerce; it purchases its rolling stock, valued at over $2,000,000, from sources outside the State of Wisconsin (No. 329; R. 106–107, 140–141, 153–154). Upon these facts, the National Labor Relations Board, in 1947, assumed jurisdiction over the Company and conducted a

employs approximately 3,100 employees, of whom approximately 2,700 comprise the appropriate collective bargaining unit for which Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, hereinafter referred to as the Union, is the exclusive representative under Section 9 (a) of the National Labor Relations Act (No. 329; R. 164; No. 330; R. 164).

From 1934 through December 1948, the Company and the Union maintained contractual relationships through collective bargaining without resort to strike or lockout (No. 329, R. 105, 108; No. 330, R. 164). On June 11, 1948, the parties executed a collective bargaining agreement terminable by either party on December 31, 1948, by the giving of appropriate notice sixty days in advance of that date (No. 330, R. 164–165).

On October 27, 1948, in accordance with the terms of the contract and Section 8 (d) of the Labor Management Relations Act, the Union sub-

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union-shop authorization election pursuant to the provisions of Section 9 (e) (1) of the National Labor Relations Act (No. 330; R. 132). *Milwaukee Electric Railway & Transport Co.*, Case No. 31–UA–8. The National Board's Regional Office, in addition, is presently investigating on the merits a charge filed with it by the Union that the Company in the course of negotiations which led to the application of the Wisconsin statute here in issue, refused to bargain collectively in good faith in violation of Section 8 (a) (5) of the National Act (No. 329; R. 106, 144; No. 330, R. 224–225). *Milwaukee Electric Railway & Transport Co.*, Case No. 13–CA–212.

mitted to the Company written proposals for certain specified changes in the contract and requested a bargaining conference (No. 330, R. 165). On October 29, 1948, the Company notified the Union that it was terminating the agreement as of December 31, 1948, and submitted its own proposals for a new contract (No. 330, R. 165–166). Negotiations were conducted during November and December 1948, but did not result in an agreement (No. 330, R. 166). The principal issues in dispute were wages, hours and working conditions (No. 330, R. 175–205). The Union offered to submit the issue to voluntary arbitration; the Company rejected this proposal (No. 329; R. 141–144, 108; No. 330, R. 166),[3] and insisted that the only way the matter could be determined was through statutory arbitration (No. 329, R. 144, 108).

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[3] In an affidavit filed with the state board, George Koechel, president of the Union, asserted that the Company advanced as its reason for refusing to agree to voluntary arbitration, the fact that it was committed by agreement with all other public-utility employers in the State of Wisconsin to refuse such method of arbitration (No. 330, R. 134, cf. 149). In its answer to the complaint, the Union alleged that the Company's final offer during the process of conciliation was less favorable than any offer it had previously made (No. 329, R. 143). This allegation was undenied and was treated as true by the Circuit Court (No. 329, R. 108). In its charge filed with the Board's Regional Office on February 9, 1949, Case No. 13-CA-212, see note 2, *supra*, the Union alleged that the parties' failure to reach agreement in these negotiations was the result of the Company's refusal to bargain collectively in good faith (No. 330, R. 152–153, 224–225).

No. 329.—As a result of the parties' failure to agree upon the terms of a new contract, and in support of its economic demands, the Union, on December 31, 1948, voted to authorize its General Executive Board to call a strike (R. 102, 132–133). The Executive Board set January 5, 1949, as the date of such strike, and gave publicity to this action (R. 102). Thereupon, the Wisconsin Board, pursuant to Section 111.63 of the State Act, filed a petition in the Circuit Court of Milwaukee County (R. 120–124) to enjoin the proposed strike. The court, on January 4, 1949, issued a temporary restraining order[4] (R. 119–120), and on April 11, 1949, issued a permanent injunction (R. 151–156, 157), restraining petitioners from (R. 155–156):

> calling a strike, going out on strike or causing any work stoppage or slow-down which would cause an interruption of the passenger service of the Milwaukee Electric and Transport Company in the State of Wisconsin, and from instigating, inducing or conspiring with or encouraging any strike or slow-down or work stoppage which would cause interruption of the public passenger service of said Company, all subject to 111.64 Wisconsin statutes.

In so holding the court rejected petitioners' contention that the injunction and the statutory pro-

[4] In obedience to this order, the strike was postponed pending disposition of the injunction action (R. 103).

visions on which it was based conflicted with the National Labor Relations Act, and therefore violated the Commerce Clause of the Constitution of the United States (R. 145–146, 154).

On May 2, 1950, the Supreme Court of Wisconsin affirmed the judgment on the authority of *International Union* v. *Wisconsin Employment Relations Board*, 333 U. S. 853 (R. 163–171), and on June 30, 1950, denied petitioners' motion for rehearing (R. 172–173).

No. 330.—On December 31, 1948, the Company, alleging that the parties had reached an impasse in negotiations, filed a petition with the State Board pursuant to Section 111.54 of the Act, requesting the appointment of a conciliator (R. 119).[5] Upon finding that an impasse had occurred despite good faith efforts of the parties to reach agreement,[6] the State Board, on January 5, 1949, appointed a conciliator (R. 137–139). On January 29, the conciliator advised the Wisconsin Employment Relations Board that had been

[5] In an affidavit submitted by the Union to the State Board in support of its motion to dismiss the Company's petition for appointment of a conciliator, it was alleged that a representative of the Federal Conciliation and Mediation Service was still actively engaged in attempting to mediate the dispute when the Company invoked the provisions of the State law (R. 134). In reviewing the arbitration award the Circuit Court found "the employees were willing to continue to bargain. The Company, apparently, was not" (R. 104).

[6] The good faith of the employer in these negotiations is one of the issues presently being investigated by the National Board. See notes 2 and 3, *supra*.

unable to effect a settlement within the time allotted (R. 141). On January 31, the Board, acting pursuant to Section 111.55 of the Wisconsin statute, appointed a Board of Arbitration (R. 143).

After conducting a hearing the Board of Arbitration issued its findings of fact, decision and order (R. 162–213, 214–222) which was filed, as required by the statute, with the clerk of the Circuit Court of Milwaukee County, on April 11, 1950 (R. 101, 108, 113, 116). The Union thereupon filed a petition in that court to review and set aside the Board's order on the principal ground that the entire proceedings and the statute under which they were conducted were null and void because they violated the Commerce Clause of the Federal Constitution in that they were in conflict with the National Labor Relations Act (No. 330, R. 106, 103, 145).

A judgment denying relief was issued on February 23, 1950 (R. 225–226). On appeal, the Supreme Court of Wisconsin affirmed the judgment on the authority of its decision in No. 329, p. 7, *supra* (R. 237).

SUMMARY OF ARGUMENT

A. The plan of regulation which Wisconsin has attempted to apply to the bargaining relationship here involved is inconsistent with the applicable federal plan of regulation. The National Act

permits strikes for higher wages after the notices contemplated by Section 8 (d) have been filed and the appropriate waiting period has been observed. Under the state Act, such a strike would be unlawful, and, in the instant case, was perpetually enjoined. In bargaining over the terms of a new contract, under the provisions of the National Act, the parties are obliged to negotiate in good faith with a view toward reaching an agreement, but neither party can be required to "agree to a proposal" or make a concession (Section 8 (d)). Under the state Act, if an impasse or stalemate is reached, the parties may be compelled to accept terms imposed by a state appointed board of arbitration. Under the scheme of the National Act, the parties understand that if an impasse or stalemate is reached, despite efforts of governmental agencies to resolve the dispute through mediation and conciliation, a strike may lawfully occur. Under the state Act negotiations are conducted with the understanding that there cannot be an ultimate resort to strike. Thus, under the state law, the ultimate sanction relied upon by Congress to induce the parties to reach agreement is eliminated. Experience has shown that where compulsory arbitration is by law made the terminal point in the bargaining process, voluntary agreements are seldom reached. The prospect of settlement through compulsory arbitration creates an atmosphere hostile to fruitful negotiations.

B. The terms of the National Act and its legislative history show that Congress rejected compulsory arbitration as incompatible with the system of free collective bargaining.

1. The Act on its face shows that Congress rejected governmental imposition of terms and conditions of employment in favor of a system of free collective bargaining in which terms and conditions of employment are fixed by voluntary agreement of the parties. Governmental agencies, though encouraged to assist in the settlement of disputes by providing facilities for conciliation, mediation and voluntary arbitration, were precluded from determining the merits of the position of the parties, or compelling the parties to agree to or abide by any particular terms or conditions of employment.

2. Here, as in *United Automobile Workers* v. *O'Brien*, 339 U. S. 454, the legislative history of the National Act shows that Congress considered and rejected on the merits the specific scheme of regulation which the state has attempted to impose. Congress rejected proposals to prohibit strikes and impose compulsory arbitration in public utility disputes because it believed such measures to be incompatible with free collective bargaining and because they tended to lead to "complete socialization of our economy." Statement of Senator Taft, Legislative History of the Labor Management Relations Act, pp. 1007–1008. For

these reasons Congress rejected provisions for compulsory arbitration even as to strikes which created national emergencies (*ibid.*). See also, S. Rep. No. 105 on S. 1126, pp. 2, 13–14. The legislative history also shows that despite proposals to treat labor disputes in public utilities differently from labor disputes in other industries subject to the Act because such disputes affected the public more seriously, Congress chose to preserve collective bargaining and the right to strike in these industries as in all others. Congress refused to incorporate in the law "an ultimate resort to compulsory arbitration or to seizure, or to any other action" in public utility disputes.

C. The holding of this Court in *United Automobile Workers* v. *O'Brien,* 339 U. S. 454, 456–457, that none of the pertinent sections of the National Act "can be read as permitting concurrent state regulation of peaceful strikes for higher wages," is applicable to privately owned public utilities, as the citation of *La Crosse Telephone Corp.* v. *Wisconsin Board,* 336 U. S. 18, in support of that holding indicates. Application of the state Act thwarts this intention. By destroying the right to strike for higher wages completely, the Wisconsin Act makes far deeper inroads upon "federally protected labor rights" than did the Michigan statute which was struck down in the *O'Brien* case. 339 U. S., at p. 458. By imposing compulsory arbitration, the state Act impairs

collective bargaining and conflicts with the determination of Congress that such measures should not be imposed in local public utilities subject to the National Act. Nothing in the language or legislative history of the Act suggests that Congress intended to permit the states to override its deliberate judgment in this respect. If Congress had so intended it would clearly have provided for reservation of such power to the States. Compare Sections 10 (a), 14 (b), 8 (d), 202 (c) and 203 (b).

That Congress, even in treating national emergency strikes, rejected compulsory arbitration and left employees free to strike, after the eighty-day waiting period was complied with, establishes beyond question that such measures, for whatever reason applied, are incompatible with national policy. Congress certainly did not intend to sanction for the treatment of local emergencies, measures which it refused to permit even to avoid great hardships to the entire Nation.

The Wisconsin statute also narrows the subject matter of the collective bargaining required by federal law, inasmuch as it prohibits arbitrators from making awards which "infringe management prerogatives", as defined in Wisconsin.

We do not contend that the federal statute completely bars the states from dealing with local emergencies resulting from utility strikes. Congress plainly contemplated that state mediatory

agencies could still function. Whether the states can go further need not be determined here. They certainly cannot use means inconsistent with federal policy, which Congress has specifically rejected for national emergencies, although they might perhaps adopt for local emergencies measures not impairing collective bargaining to a greater extent than those employed by Congress for national emergencies.

ARGUMENT

THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, PRECLUDES WISCONSIN FROM APPLYING ITS COMPULSORY ARBITRATION, NO-STRIKE STATUTE TO THE COLLECTIVE BARGAINING RELATIONSHIP HERE INVOLVED

A. THE PRACTICAL DIFFERENCES BETWEEN THE NATIONAL ACT AND THE WISCONSIN STATUTORY SCHEME

1. The National Act

(*a*) *Provisions regulating collective bargaining and preserving the right to strike.*—In the National Labor Relations Act, as amended, as in the initial Act, Congress, to protect the public interest in the free flow of commerce, adopted the policy of "encouraging the practice and procedure of collective bargaining" (Section 1). In Section 201 (a) of the Labor Management Relations Act, Congress declared that it is through this process that "sound and stable industrial peace and advancement of the general welfare, health, and safety of the Nation and of the best interests of

employers and employees can most satisfactorily be secured." Section 8 (d) of the National Act, as amended, defines in detail the "duty to bargain collectively," which Congress, in furtherance of this policy, imposed upon both employers and labor organizations. Employers and labor organizations subject to the Act are required to negotiate in good faith with respect to wages, hours and other terms and conditions of employment with a view toward reaching an agreement, and are required to reduce to writing any agreement reached, if that is requested by either party. The Section specifically states, however, that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession."

Aware that existence of the right to strike in support of lawful economic demands is indispensable to the practice of collective bargaining, Congress in Sections 7, 2 (3), and 13 of the amended Act, as in the initial Act, "safeguarded the exercise by employees of 'concerted activities' and expressly recognized the right to strike." *United Automobile Workers* v. *O'Brien,* 339 U. S. 454, 457.

(b) *Provisions defining the role of governmental agencies in avoiding strikes.*—Congress in Section 201 (b) of the Labor Management Relations Act declared that

> the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration * * *.

To this end Congress, in the amended Act, created the Federal Mediation and Conciliation Service[7] (Sections 202–204), authorized to "seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion." Section 203 (c). Congress contemplated also that state agencies would play an important role in furnishing such services, particularly in disputes having only a minor effect on interstate commerce. Thus, Section 203 (b) provides that "The Director and Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties."

To afford adequate opportunity for mediation and conciliation efforts, Congress, in Section 8 (d), provided that thirty days' notice to the Federal Mediation and Conciliation Service and to any "State * * * agency established to mediate and conciliate disputes within the State * * * where the dispute occurred" should be

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[7] Formerly the Conciliation Service of the Department of Labor.

a prerequisite to strikes over contract termination or modification. Emphasizing that the conciliation and mediation procedure contemplated in these provisions did not comprehend authority to impose terms of settlement against the will of the parties, Congress further provided in Section 203 (c) that "The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act."

In Sections 206–210, Congress "detailed procedures for strikes which might create a national emergency." *United Automobile Workers* v. *O'Brien*, 339 U. S. 454, 457. Section 206 provides that: "Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him." The report shall include a statement of facts with respect to the dispute "but shall not contain any recommendations." Section 208 (a) provides that upon receiving a report from such a board of inquiry the Presi-

dent may direct the Attorney General to obtain injunctive relief against the threatened strike or lockout, and authorizes the district courts of the United States to issue such injunctions, effective for a period of eighty days (Sections 209–210). Section 209 (a) further provides that during the period in which such an injunction is outstanding the parties to the dispute shall "make every effort to adjust and settle their differences, with the assistance of the Service created by this Act. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service." If at the end of sixty days a settlement has not been reached, the board of inquiry makes a further report which is to be published by the President, and the National Labor Relations Board conducts a secret ballot on the employer's last offer of settlement and certifies the results thereof to the Attorney General (Section 209 (b)). Section 210 provides that eighty days after issuance of the injunction, the injunction shall be discharged on motion of the Attorney General, and a comprehensive report on the dispute shall thereupon be submitted by the President to Congress.

(c) *Application of the provisions of the National Act to privately owned public utilities affecting commerce.*—The National Act, as amended, exempts from its definition of "employer," and hence from the applicability of the

Act, "the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act" (Section (2)), and employees of persons so exempted (Section 2 (3)). [8]These exceptions aside, the Act applies to all private employers engaged in operations affecting interstate commerce and to their employees (Section 2 (6) and (7)). The Act has often been held to apply to private public utilities, which are engaged in the furnishing of such services as vater, light, heat, gas, electric power, public passenger transportation and communication, the operations of which affect interstate commerce. *LaCrosse Telephone Corp.* v. *Wisconsin Employment Relations Board,* 336 U. S. 18; *Consolidated Edison* v. *National Labor Relations Board,* 305 U. S. 197; *National Labor Relations Board* v. *Baltimore Transit Company,* 140 F. 2d 51 (C. A. 4), certiorari denied, 321 U. S. 795; *National Labor Relations Board* v. *Gulf Public Service Co.,* 116 F. 2d 852 (C. A. 5); *Pueblo Gas and Fuel Co.* v. *National Labor Relations Board,* 118 F. 2d 304 (C. A. 10); *National*

[8]The exemption of wholly owned Government corporations, Federal Reserve Banks, and hospitals operated not for profit did not appear in the original Act (Section 2 (2) and (3)).

Labor Relations Board v. *Central Missouri Telephone Co.*, 115 F. 2d 563 (C. A. 8). Section 10 (a) of the amended Act expressly confirms the Board's jurisdiction over companies engaged in furnishing "transportation", where the operations are "predominantly local in character".

The Act does not distinguish in any respect between enterprises of this character and enterprises engaged in the production of goods affecting interstate commerce. The National Board conducts representation proceedings, and fixes appropriate bargaining units composed of employees of privately owned public utilities (*La-Crosse* case, and cases cited, note 8, *infra*). The appropriate unit in these industries, as in industries engaged in the production of goods (cf. *United Automobile Workers* v. *O'Brien*, 339 U. S. 454, 458), sometimes includes employees in more than one state.[9] In these industries, as in all others subject to the Act, the Board enforces the duty to bargain collectively, and protects against em-

[9] *American Bus Lines, Inc.*, 79 NLRB 329; *Pacific Telephone and Telegraph Co.*, 58 NLRB 1042; *Gulf States Utilities Co.*, 31 NLRB 740; *Southwestern Associated Telegraph Co.*, 76 NLRB 1105; *New England Telephone & Telegraph Co.*, 90 NLRB No. 102; *Dixie Motor Coach Corp.*, 25 NLRB 869, enforced, 128 F. 2d 201 (C. A. 5); *Capitol Greyhound Lines*, 49 NLRB 156, enforced, 140 F. 2d 754 (C. A. 6); *Delaware-New Jersey Ferry Co.*, 1 NLRB 85, set aside on other grounds, 90 F. 2d 520 (C. A. 3). Cf. *Norfolk Southern Bus Co.*, 66 NLRB 1165, enforced 159 F. 2d 516 (C. A. 4), certiorari denied, 330 U. S. 844.

ployer interference the right to engage in "concerted activities" which the Act recognizes.[10]

Construing the initial Act, the Board and the courts explicitly rejected the contention that because the States regulate the rates and service of public utilities, and because of the importance to the public of the service which employees of public utilities perform, such employees should not be deemed to be protected by the Act when they exercise the right to strike for legitimate economic demands. In *El Paso Electric Co.*, 13 N. L. R. B. 213, 240, enforced, *sub nom., El Paso Electric Co.* v. *National Labor Relations Board,* 119 F. 2d 581 (C. A. 5), a strike case, the Board explicitly, stated that the Act does not "distinguish between public-utility employees and those otherwise employed." [11] The pertinent provisions of the initial Act, Sections 2 (3), 7 and 13, on

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[10] *National Labor Relations Board* v. *Central Missouri Telephone Co.*, 115 F. 2d 563 (C. A. 8); *Pueblo Gas & Fuel Co.* v. *National Labor Relations Board*, 118 F. 2d 304 (C. A. 10); *National Labor Relations Board* v. *Western Massachusetts Electric Co.*, 120 F. 2d 455 (C. A. 1); *National Labor Relations Board* v. *Gulf Public Service Co.*, 116 F. 2d 852 (C. A. 5); *El Paso Electric Co.* v. *National Labor Relations Board*, 119 F. 2d 581 (C. A. 5); *Kansas City Power & Light Co.* v. *National Labor Relations Board*, 111 F. 2d 340 (C. A. 8); *Oklahoma Transportation Co.* v. *National Labor Relations Board*, 140 F. 2d 509 (C. A. 5); *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533; *National Labor Relations Board* v. *Southern Bell Telephone & Telegraph Co.*, 319 U. S. 50.

[11] See also cases cited, note 10, *supra*.

which these holdings were based, were reenacted in the amended Act, without material change.

Like the provisions of Title I of the Labor Management Relations Act, the provisions of Title II also apply without distinction to public utilities and private enterprises engaged in the production of goods. Thus, the provision of Section 203 (b), which directs the Federal Conciliation and Mediation Service to avoid attempting to mediate disputes which have only a minor effect on commerce if State or local conciliation services are available, applies whether public utilities or other enterprises are involved. And Sections 206–210, which prescribe procedures for strikes which may imperil the national health or safety, do not distinguish between public utilities and other types of enterprises.[12] These Sections may be invoked with respect to any industry "engaged in trade, commerce, transportation, transmission, or communication among the several States * * * or engaged in the production of

[12] The comparable provisions of the House Bill, H. R. 3020, Sections 203–206, applied only to "transportation, public utility, or communication services." The conference agreement extended the provisions to industries engaged in the production of goods as well. H. Conf. Rep. No. 510 on H. R. 3020, 80th Cong., 1st Sess., pp. 63–64. The provisions of the House Bill could have been invoked whenever a labor dispute threatened cessation or curtailment of "interstate or foreign commerce" in "services essential to the public health, safety, or interest." Under the bill as enacted, the emergency provisions may be invoked only when a strike or lock-out would imperil the "national health or safety" (*ibid.*).

goods for commerce" (Section 206). They have already been invoked with respect to labor disputes in the atomic energy, meat packing, telephone, maritime and coal industries.[13]

2. The State Act

The Wisconsin Act declares (Section 111.50), that a labor dispute which threatens "interruption in the supply of an essential public utility service, to the citizens of this state * * * creates an emergency" warranting state intervention in the public interest. The Act is made applicable to employers "engaged in the business of furnishing water, light, heat, gas, electric power, public passenger transportation, or communication" (Section 111.51 (1)). To prevent such interruptions, the state law absolutely prohibits strikes for higher wages and better working conditions by employees of private "public utility" employers; makes strikes in such industries "misdemeanors" (Section 111.62); and provides for the issuance of injunctions to restrain such strikes or threatened strikes (Sections 111.62, 111.63).

The Wisconsin Act (Section 111.50), further provides "settlement procedures for labor disputes between public utility employers and their employees in cases where * * * the parties are unable to effect such settlement." Pursuant to

[13] Federal Mediation and Conciliation Service, First Annual Report (Gov't Print. Off., 1949), pp. 40–54; see also, Second Annual Report (Gov't Print. Off., 1950), pp. 23–32.

these procedures, the state board is directed to appoint a conciliator if "in its opinion, the collective bargaining process, notwithstanding good faith efforts on the part of both sides to such dispute, has reached an impasse and stalemate" (Section 111.54). If, after the time allotted for conciliation, the conciliator reports to the state board that he is unable to effect a settlement, the board is authorized, "if it believes that a continuation of the dispute will cause or is likely to cause the interruption of an essential service," to appoint a board of arbitration (Section 111.55). The arbitrators so appointed are directed to hold hearings on the issues in dispute and "to promulgate a written decision and order, upon the issue or issues presented in each case" (Section 111.57 (1) and (2)).

The Act further provides that "Where there is no contract between the parties, or where there is a contract but the parties have begun negotiations looking to a new contract or amendment of the existing contract, and wage rates or other conditions of employment under the proposed new or amended contract are in dispute," the arbitrator, in arriving at a decision, shall give weight to a number of factors, including comparative wage rates in the local operating area, value of services to the consumer, and the overall compensation received by employees (Section 111.57 (3)). The statute further provides (Section 111.58) that

"The arbitrator shall not make any award which would infringe upon the right of the employer to manage his business or which would interfere with the internal affairs of the union." The order of the board of arbitration, when filed with the clerk of the appropriate circuit court is declared to be binding upon the parties for a period of one year and governs the terms and conditions of employment unless set aside by the court on review (Sections 111.59 and 111.60).

3. The Practical Differences Between the Operation of the State and Federal Statutes—the Possibility of Compulsory Arbitration Makes Free Collective Bargaining Ineffective

The operations of the company here involved affect interstate commerce, and the terms of the National Act govern labor relations between the Company and its employees (*supra*, pp. 3–4). Pursuant to the terms of the National Act, after giving the employer sixty days notice of their desire to modify or terminate the contract which expired on December 31, 1948, and notifying both the Federal and State conciliation agencies within thirty days after the initial notice, and continuing in effect the terms of the agreement for sixty days following the original notice and until the contract expired, the union would have been free to strike in support of its lawful economic demands. Unless the strike affected not only this Company, but a substantial part of the public transportation industry, and imperiled the "na-

tional health or safety," the procedures of Sections 206–210 could not have been invoked with respect to such a strike.[14] Under the State Act, however, participation in such a strike would be illegal, and the proposed strike was perpetually enjoined (No. 329, R. 155–157).

In bargaining over the terms of a new contract, under the provisions of the National Act, the parties are obliged to negotiate in good faith with a view toward reaching agreement, but neither party can be required to "agree to a proposal" or make a concession (Section 8 (d)). Under the State Act, if an impasse or stalemate is reached, the parties may be compelled to accept terms imposed by a State appointed board of arbitration. Under the scheme of the National Act, the parties understand that if an impasse or stalemate is reached, despite efforts of governmental agencies to resolve the dispute through mediation and conciliation, a strike may lawfully occur. Under the State Act negotiations are conducted with the understanding that there cannot be an ultimate resort to strike. Thus, under the State law, the ultimate sanction relied upon by

[14] Perhaps the provisions of Sections 206–210 could not be invoked even if a strike affected all local privately owned public transportation systems in the country, since those provisions are applicable only to industries "engaged in * * * commerce * * * among the several states," and local transit systems, though "affecting interstate commerce" are not generally "engaged" therein.

Congress to induce the parties to reach agreement is eliminated.

Experience has shown that while under a system of free collective bargaining the parties by negotiation and compromise most frequently reach agreement without resort to strike, where compulsory arbitration is by law made the terminal point in the bargaining process, voluntary agreements are seldom reached. Studies of the effects of State statutes requiring compulsory arbitration of public-utility disputes reveal that the very existence of such statutes creates an atmosphere hostile to fruitful negotiations.[15] From the first step in the bargaining process the minds of the negotiators are focused on the possibility of a public hearing, and an ultimate decision of the issues by an arbitration board. If either party believes or has reason to hope for a better settlement from the arbitrator than he could obtain at the bargaining table, he will not make a good faith attempt to settle, but will refuse to

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[15] MacDonald, *Compulsory Arbitration in New Jersey*, Proceedings of New York University Second Annual Conference on Labor, 625, 684, 701 (1949); Kennedy, *The Handling of Emergency Disputes*, Proceedings of the Second Annual Meeting of The Industrial Relations Research Association, 14, 19–23 (1949); Teller, *What Should Be Done About Emergency Strikes*, 1 Labor Law Journal, 263, 266–268 (1950); Schwartz, *The Use of Compulsion In Public Utility Labor Problems*, 267 (1950) (unpublished thesis, University of Wisconsin); *Constitutionality of State Statutes Compelling Arbitration of Labor Disputes*, 33 Marquette L. Rev. 48, 52 (1949).

make concessions and insist upon going to arbitration.[16] (Cf. statement of Senator Taft, *infra*, p. 37). The Circuit Court found in this case that the Company insisted upon compulsory arbitration under the state Act (*supra*, p. 5), and that the Union was willing to continue negotiations but the Company was not (*supra*, p. 7, note 5). The charge filed by the Union with the National Board (notes 2, 3 and 4, *supra*), alleges that this factor was responsible for the failure of the parties to reach agreement in the instant case.

It has also been pointed out that where compulsory arbitration is available as a routine remedy in public-utility disputes, "A company may prefer to use compulsory arbitration * * * if it is of the opinion that the granting of what it considers a reasonable and necessary wage rate will necessitate an increase in the rates to be paid by the public for its service," since the Company may make a stronger case for a rate increase if a rise in labor costs results not from its voluntary agreement but from a state imposed settle-

[16] Since the arbitrator under the Wisconsin statute may "not make any award which would infringe upon the right of the employer to manage his business or which would interfere with the internal affairs of the union" (Section 111.58), there is incentive to both employers and labor organizations to force arbitration because the award cannot cover matters thought to constitute management prerogatives, or internal union affairs.

ment. Kennedy, *The Handling of Emergency Disputes,* Proceedings of the Second Annual Meeting of The Industrial Relations Research Association, 14, 23 (1949). This conclusion comports with the alleged practice of the public utilities in Wisconsin. See p. 5, n. 3, *supra*.

The prospect of securing better terms through arbitration often makes the position of the negotiators for the parties untenable. First, negotiators may fear to assume responsibility for any compromise. Professor Thomas Kennedy, reporting on the effects of New Jersey's public utility compulsory arbitration law, has stated:[17]

> Management representatives point out that in some bargaining relationships any settlement reached by negotiation is subject to approval by the membership of the union. They complain that under these conditions union leaders avoid negotiating a settlement lest the membership turn down the settlement and insist on going to arbitration. The union leaders are said to fear that an arbitration board might recognize more than they had been willing to settle for in negotiations. If this happened the union leadership would be thoroughly discredited. On the other hand, management negotiators admit that they think it unwise to go to what they consider to be the limit

[17] Kennedy, *The Handling of Emergency Disputes*, Proceedings of the Second Annual Meeting of Industrial Relations Research Association, 14, 21–22 (1949).

> in order to negotiate a settlement so long as rejection by the union membership may be followed by compulsory arbitration.

Second, the parties hesitate to prune down their demands and suggest what appears to them a reasonable basis for settlement, for fear that the arbitrators will consider the offer as a springboard for ultimate compromise. Professor Kennedy illustrates this as follows (*ibid.*, p. 21):

> A company and a union may both believe that a ten-cent increase is a reasonable settlement, yet the union will not budge from a demand of 20 cents and the company will not offer more than four cents. The company is afraid to move up to eight cents lest the union refuse to decrease its demands and the arbitrators consider eight cents to 20 cents instead of four cents to 20 cents as the area within which to compromise. For the same reason the union is afraid to move down to 15 cents.

Professor Kennedy concludes (*ibid.*) that "Negotiations are thus stymied and compulsory arbitration is both the cause and the result of the failure of free collective bargaining."[18]

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[18] Professor Kennedy also points out (*ibid.*, p. 22) that the prospect of compulsory arbitration creates obstacles to "washing out" the unessential demands of the parties. He notes: "the number of demands with which the parties enter negotiations has probably not increased but compulsory arbitration has made it much more difficult to eliminate the chaff and reduce the dispute to the two or three major issues. Each

Experience with labor relations in public utilities under the New Jersey compulsory arbitration law (N. J. Stat. Ann., Tit. 34, C. 13B (Supp. 1950)), reveals that companies which, prior to enactment of the law, over long periods of time, reached voluntary agreements with labor organizations through free collective bargaining, have been unsuccessful in doing so after enactment of the law. Professor Kennedy points out (*ibid.* pp. 20–21), that the Public Service Transportation Company, the largest operator of city busses in the United States, and the Amalgamated Association of Street, Electric Railway and Motor Coach Employees, AFL,

> have been bargaining with each other for more than thirty years. During this entire period there have been no strikes or slowdowns since 1923. * * * One might

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party now holds on to demands which would quickly be eliminated if free collective bargaining prevailed. After all, the arbitration Board, composed of men who are unfamiliar with the industry's and the union's problems, may grant these extra demands. Moreover, if the arbitration board rules against one of the parties on a number of minor issues it may be more inclined to favor it on the major issues in order to appear to be fair. Thus, if there is a possibility that the negotiations will not be successful, each party wants to have many demands to present to the arbitration board regardless of their merits. An examination of all the issues presented in the arbitration cases under the [New Jersey] Act indicates that this policy has been pursued to a considerable extent. As one of the public members of an arbitration board remarked, 'They come with everything, including the kitchen sink, properly dressed up'." (Footnotes omitted.)

> have expected that such collective bargaining would have continued without much change under compulsory arbitration legislation. This has not been the case. * * * In 1947, the first year that compulsory arbitration was effective, the parties were unable to reach an agreement. This was the first peacetime negotiation which failed since 1923. It was only the beginning. In 1948 and again this year the parties have had the major terms of their contracts determined by compulsory arbitration rather than by free negotiation. Thus, free collective bargaining has been ineffective in this relationship and the parties doubt * * * that it can ever be revitalized as long as the law is in effect. A number of other New Jersey utility companies, and their unions, have had the same experience. It is highly significant that without exception every company which had new contract terms settled by compulsory arbitration under the Act in 1947 repeated this performance in 1948.

The collective bargaining history of the Company and the Union here involved before and after passage of the Wisconsin Act (pp. 4–5, *supra,* No. 329, R. 105–106, 108, 141–144), is arrestingly parallel.

B. THE NO-STRIKE AND COMPULSORY ARBITRATION PROVISIONS OF THE WISCONSIN ACT ARE INCONSISTENT WITH THE SCHEME ADOPTED BY CONGRESS FOR REGULATING COLLECTIVE BARGAINING AND STRIKES IN PRIVATELY OWNED PUBLIC UTILITIES AND ALL OTHER INDUSTRIES SUBJECT TO THE NATIONAL ACT

1. The Terms of the Act Show That Congress Rejected Compulsory Arbitration as Incompatible With the System of Free Collective Bargaining

The system of compulsory arbitration and denial of the right to strike which Wisconsin applies to labor relations in "public utility" industries is antithetical to the system of collective bargaining which Congress deliberately chose to apply to these as well as all other enterprises subject to the National Act. The terms of the National Act themselves show that Congress rejected governmental imposition of terms and conditions of employment in favor of a system of free collective bargaining in which terms and conditions of employment are fixed by voluntary agreement between employers and bargaining representatives of employees. In Section 201 (b) Congress declared that the proper function of governmental officials was to assist in the voluntary settlement of issues between employers and employees through the collective bargaining process, by providing facilities for "conciliation, mediation, and *voluntary arbitration*" [italics added]. Highlighting its rejection of compulsory arbitration, Congress, in defining the duty to bargain (Section 8 (d)), reserved to both employers and labor organizations the right to refuse to

agree to any economic demand or to make a concession. The National Board is thereby precluded from "determining the merits of the positions of the parties" or compelling the parties to agree to or abide by any particular terms or conditions of employment. H. Conf. Rep. No. 510 on H. R. 3020, 80th Cong., 1st Sess., p. 34. Congress likewise emphasized that the Director of the Federal Mediation and Conciliation Service was precluded from compelling the parties to a labor dispute, even in national emergency cases, to accept any particular terms, by providing that "Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service" (Section 209 (a), cf. Section 203 (c)). Further indicating its opposition to the imposition of settlement terms by any governmental agency, Congress in Section 206 provided that the reports of boards of inquiry convened in national emergency cases "shall include each party's statement of its position but shall not contain any recommendations."[19]

2. The Legislative History Shows That Congress Rejected Proposals for Compulsory Arbitration of Public Utility Disputes on the Merits

In the *O'Brien* case, 339 U. S. 454, 458, note 5, this Court regarded as significant the fact that the

[19] A contrary provision, authorizing the making of recommendations was contained in the House Bill (Section 204 (c)), but the House proposal was rejected in conference. H. Conf. Rep. No. 510 on H. R. 3020, pp. 63–64.

legislative history showed that Congress had considered but rejected on the merits cooling-off and strike vote provisions similar to those which Michigan in that case applied to an enterprise subject to the National Act. Congress also considered and rejected proposals for compulsory arbitration of disputes over wages and hours in public utilities, the very plan of regulation which Wisconsin has here attempted to impose. And here, as in *O'Brien*, the legislative history clearly shows that the "proposal was rejected on the merits, and not because of any desire to leave the states free to adopt it."

In a comprehensive statement to the Senate (Leg. Hist. of the Labor Management Relations Act, pp. 1007–1008, 93 Cong. Rec. 3835), a portion of which this Court quoted in the *O'Brien* case, 339 U. S., at 457, note 3, Senator Taft, speaking for the Senate Committee which he headed, declared:

> * * * the solution of our labor problems must rest on a free economy and on free collective bargaining. The bill is certainly based upon that proposition. That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract. *We recognize that right in spite of the inconvenience, and in some cases perhaps danger, to the people of the United States which may result from the*

exercise of such right. In the long run, I do not believe that that right will be abused. In the past few disputes finally reached the point where there was a direct threat to and defiance of the rights of the people of the United States.

We have considered the question whether the right to strike can be modified. I think it can be modified in cases which do not involve the basic question of wages, prices, and working conditions. But if we impose *compulsory arbitration,* or if we give the Government power to fix wages at which men must work for another year or for two years to come, I do not see how in the end we can escape a collective economy. If we give the Government power to fix wages, I do not see how we can take from the Government the power to fix prices; and if the Government fixes wages and prices, we soon reach the point where all industry is under Government control, and finally there is a complete socialization of our economy.

I feel very strongly that so far as possible we should avoid any system which attempts to give to the Government this power finally to fix the wages of any man. Can we do so constitutionally? Can we say to all the people of the United States, "You must work at wages fixed by the Government?" I think it is a long step from freedom and a long step from a free economy to give the Government such a right. [Italics added.]

Addressing himself specifically to proposals for compulsory arbitration in public utilities, Senator Taft continued:

> It is suggested that we might do so in the case of public utilities; and I suppose the argument is stronger there, because we fix the rates of public utilities, and we might, I suppose, fix the wages of public-utility workers. Yet we have hesitated to embark even on that course, because if we once begin a process of the Government fixing wages, it must end in more and more wage fixing and finally Government price fixing. It may be a popular thing to do. Today people seem to think that all that it is necessary to do is to forbid strikes, fix wages, and compel men to continue working, without consideration of the human and constitutional problems involved in that process.
>
> If we begin with public utilities, it will be said that coal and steel are just as important as public utilities. I do not know where we could draw the line. *So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. We have done nothing to outlaw strikes for basic wages, hours, and working conditions after proper opportunity for mediation.* [Italics added.]

Senator Taft went on to outline the provisions in the proposed statute for dealing with national emergencies, and continued (*ibid.*):

> We did not feel that we should put into the law, as a part of the collective-bargaining machinery, *an ultimate resort to compulsory arbitration, or to seizure, or to any other action. We feel that it would interfere with the whole process of collective bargaining.* If such a remedy is available as a routine remedy, there will always be pressure to resort to it by whichever party thinks it will receive better treatment through such a process than it would receive in collective bargaining, and it will back out of collective bargaining. It will not make a bona fide attempt to settle if it thinks it will receive a better deal under the final arbitration which may be provided.

The Senate Report on the bill (S. Rep. No. 105 on S. 1126), emphasizes the determination of Congress to avoid compulsory arbitration and other forms of governmental dictation of the terms of settlement of labor disputes. The Report, declaring that both management and labor "must recognize that the rights of the general public are paramount," makes clear that (S. Rep. No. 105, p. 2; Leg. Hist., p. 408):

> The committee bill is predicated upon our belief that a fair and equitable labor policy can best be achieved by equalizing existing laws in a manner which will encourage free collective bargaining. Government decisions should not be substituted for free agreement * * *.

The Committee Report also shows that it was Congress' dissatisfaction with the system of compulsory arbitration which led to its rejection. The Report states (*ibid.*, pp. 13–14; Leg. Hist., pp. 419–420):

> In dealing with the problem of the direct settlement of labor disputes the committee has considered a great variety of the proposals ranging from compulsory arbitration, the establishment of fact-finding boards, creation of an over-all mediation tribunal, and the imposition of specified waiting periods. In our judgment, while none of the suggestions is completely devoid of merit, the experience of the Federal Government with such devices has been such that we do not feel warranted in recommending that any such plans become permanent legislation.
>
> Under the exigencies of war the Nation did utilize what amounted to compulsory arbitration through the instrumentality of the War Labor Board. This system, however, tended to emphasize unduly the role of the Government, and under it employers and labor organizations tended to avoid solving their difficulties by free collective bargaining. It is difficult to see how such a system could be operated indefinitely without compelling the Government to make decisions on economic issues which in normal times should be solved by the free play of economic forces. Moreover, the wartime experiment of the 30-day wait-

> ing period under the War Labor Disputes Act was not a happy one, since it was too frequently used as a device for bringing to a rapid crisis disputes which might have been solved by a patient negotiation. For similar reasons except in dire emergencies the establishment of fact-finding boards or over-all mediation tribunals also cause dubious results. Recommendations of such bodies tend to set patterns of wage settlements for the entire country which are frequently inappropriate to the peculiar circumstances of certain industries and certain classes of employment.
>
> It is our conclusion that by modifying some of the practices under the Wagner Act which tend to destroy the balance of power in collective-bargaining negotiations by restraining one party to a dispute without restraining the other, Congress would go a long way toward making collective bargaining the most effective method of solving the industrial relations difficulties.

The legislative history also shows that because of its faith in collective bargaining as the appropriate method of resolving labor disputes between private employers and their employees, Congress refused to apply any different rule to privately owned public utilities than to other private enterprises although such treatment was advocated by some on the ground that strikes which resulted in interruption of public utility service affected

the public more seriously than strikes in other industries. Bills based on the premise that strikes which disrupted public utility service should be treated differently than strikes in other industries, and which provided that public utility strikes should be enjoined either temporarily or permanently, and that compulsory arbitration or fact finding procedures should be applied to public disputes, were introduced in the 80th Congress. See H. R. 17, 34, 75 and 76, 80th Cong., 1st Sess., 93 Cong. Rec. A–1007–1009, Leg. Hist., p. 577. Compare the statement of Congressman Case which was submitted to the House Committee on March 10, 1947, in support of these proposals, reprinted in 93 Cong. Rec. A–1007–1009; Leg. Hist., pp. 557–581; see also 93 Cong. Rec. 3123–6, 3513, 3524; Leg. Hist., pp. 586, 588, 589–590, 669, 687. Compare also the statement of Senator Wiley of Wisconsin, that "wherever the public interest is threatened by a proposed strike in a public utility like electricity, transportation, telephone, gas, *or* a key Nation-wide industry like coal or steel, Congress should set up means for compulsory arbitration of disputes. * * * Strikes in utilities *and* key Nation-wide industries must be outlawed. The public welfare must be protected." [Italics added.] 93 Cong. Rec. A–1035 (Leg. Hist., p. 993).

Witnesses who testified before the House and Senate Committees objected vigorously to all

these proposals, and particularly to those which would have outlawed strikes and imposed compulsory arbitration, on the ground that "compulsory arbitration is the antithesis of free collective bargaining;"[20] that compulsory arbitration had been proved unsuccessful in averting public-utility strikes in those jurisdictions, both

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[20] Testimony of Hon. Lewis B. Schwellenbach, former Secretary of Labor, Hearings before the House Committee on Education and Labor on Bills to amend and repeal the National Labor Relations Act, 80th Cong., 1st Sess., pp. 2994, 3033. Mr. Schwellenbach went on to say:

"* * * Labor and representative management are in complete agreement in their opposition to measures compelling arbitration. Both are aware that the existence of compulsory arbitration laws not only eliminates free collective bargaining in situations where the parties are genuinely at odds, but will frequently encourage one or both of the disputants to make only a pretense of bargaining in anticipation of a more favorable award from an arbitrator than would be realizable through their own efforts.

"The net result would be a weakening of free bargaining and an increasing reliance on the compulsory arbitration procedures, and it is obvious that with the growth of such an attitude, the use of conciliation and mediation procedures would decline concurrently."

To the same effect, see statement of William Green, President, American Federation of Labor, Hearings, *op. cit.*, *supra*, pp. 1630, 1658; brief submitted by Walter Reuther, President, United Automobile, Aircraft, Agricultural Implement Workers of America, Hearings before the Senate Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22, 80th Cong., 1st Sess., pp. 1309, 1326.

here and abroad, in which it had been tried;[21] and that relatively few public-utility disputes result in loss of working time due to strikes.[22]

In the light of these proposals and the extensive debate upon them, it is clear that Congress did not regard the "inconvenience and perhaps danger" to the public which may result from public-utility strikes (statement of Senator Taft, *supra,* pp. 34–35), as warranting interference with the system of free collective bargaining in public utilities, and that it was precisely because it desired to preserve free collective bargaining in these industries that Congress refused to incorporate in the law "an ultimate resort to compulsory arbitration, or to seizure, or to any other action" (*supra,* p. 37), measures which had been proposed particularly for public-utility disputes. S. Rep.. No. 105, *supra,* pp. 38–39. Compare

[21] See testimony of Senator Wayne Morse, Hearings before the Senate Committee on Labor and the Public Welfare, 80th Cong., 1st Sess., p. 677; Testimony of Ludwig Teller, Hearings *op. cit., supra,* pp. 247, 267; Testimony of Hon. Lewis B. Schwellenbach, former Secretary of Labor, Hearings before the House Committee on Education and Labor, 80th Cong., 1st Sess., pp. 2994, 3032; Testimony of William Green, President, American Federation of Labor, Hearings, *op. cit., supra,* 1630, 1658; Testimony of J. A. Beirne, President, National Federation of Telephone Workers, Hearings, *op. cit., supra,* pp. 2203, 2206, 2207.

[22] See statement and accompanying statistical table submitted by Joseph A. Beirne, President of the National Federation of Telephone Workers, to the Senate Committee on Labor and Public Welfare, 80th Cong., 1st Sess., pp. 1203, 1209, 1219, and his testimony before the House Committee on Education and Labor, 80th Cong., 1st Sess., pp. 2203, 2240.

Statement of Senator Morse, Hearings before the Senate Committee on Labor and Public Welfare, 80th Cong., 1st Sess., p. 677.

C. THE STATES ARE NOT EMPOWERED TO OVERRIDE THE DELIBERATE JUDGMENT OF CONGRESS BY OUTLAWING STRIKES AND SUBSTITUTING COMPULSORY ARBITRATION FOR FREE COLLECTIVE BARGAINING IN LOCAL PUBLIC UTILITIES SUBJECT TO THE NATIONAL ACT

In *United Automobile Workers* v. *O'Brien*, 339 U. S. 454, 456–457, this Court said:

> Congress has not been silent on the subject of strikes in interstate commerce. In the National Labor Relations Act * * * Congress safeguarded the exercise by employees of "concerted activities" and expressly recognized the right to strike. It qualified and regulated that right in the 1947 Act. It established certain prerequisites, with which appellants complied, for any strike over contract termination or modification. § 8 (d) These include notices to both state and federal mediation authorities; both did participate in the negotiations in this case. In provisions which did not affect appellants, Congress forbade strikes for certain objectives and detailed procedures for strikes which might create a national emergency. §§ 8 (b) (4), 206–210. *None of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages.* Congress has occupied this field and closed it to state regulation. *Plankinton Packing Co.* v. *Wisconsin Board*, 338 U. S. 953 (1950); *LaCrosse*

Telephone Corp. v. *Wisconsin Board,* 336 U. S. 18 (1949); *Bethlehem Steel Co.* v. *New York Labor Board,* 330 U. S. 767 (1947); *Hill* v. *Florida,* 325 U. S. 538. [Italics supplied.]

Citation of the *LaCrosse Telephone* case, a case involving a local Wisconsin public utility, in the *O'Brien* opinion, indicates that this Court did not regard local public utilities as exempt from the principle enunciated in that case. The suggestion in the opinion of the Supreme Court of Wisconsin in *Wisconsin Board* v. *Milwaukee Gas Light Company and United Gas, Coke and Chemical Workers of America,* decided November 8, 1950, 27 LRRM 2091, 2094, not yet officially reported, certiorari granted December 11, 1950, No. 438, that the *O'Brien* rule is inapplicable to private-utility companies because such companies "perform functions which the state might perform directly" is plainly untenable. Exemption under the National Act extends only to activities in which a "state or political subdivision thereof" does engage directly. (Section 2 (2) and 2 (3).) The functions here involved are performed not by the state or state instrumentalities, but by private corporations operating for profit. The only private organizations which Congress removed from the reach of federal law are those which operate hospitals, and, of these, only not-for-profit corporations and associations were exempted. A private corporation is not transformed

into a state instrumentality by the grant of a charter and permission to operate as a monopoly, or by state regulation of its rates or services. See, *Buckstaff Co.* v. *McKinley,* 308 U. S. 358, 362–363, and cases there cited; *Fox Film Corp.* v. *Doyal,* 286 U. S. 123, 128–129; *Alabama* v. *King & Boozer,* 314 U. S. 1, 13. The Wisconsin Act undertakes to regulate labor relations between private employers and their employees, not between the state and state employees. The very terms of the state law refute the claim that private public utilities are "state agencies", for the Act exempts from its operation, "the state or any political subdivision thereof" (Section 111.51 (1)). If utility companies were treated as state agencies under the state law, the law would have no scope for application. By applying the state Act to the Company here involved, Wisconsin has left no room for doubt that it does not regard enterprises such as these as the equivalent of "the state or any political subdivision thereof."

That Congress is empowered to regulate such private interprises even though they perform functions "in which states have traditionally engaged" is not open to question. *United States* v. *California,* 297 U. S. 175, 185. In choosing to regulate labor relations in all industries "affecting" interstate commerce as well as industries "engaged in interstate commerce," Congress deliberately subjected to national law industries in which work stoppages could be expected often

to have far greater effect upon local communities than upon the nation as a whole. Local public utilities, such as the Company involved in this case, fall in that category. Congress' concern that enterprises such as these should not be subjected to regulations inconsistent with the policy of the national Act is apparent from the provisions of Section 10 (a) of the amended Act, which authorize cession of jurisdiction by the National Board to state agencies over cases involving "mining, manufacturing, communications, and transportation" when "predominantly local in character", but only where the applicable state law is not "inconsistent with the corresponding provisions of this Act." See also, H. Rep. No. 1147, 74th Cong., 1st sess., p. 9; H. Rep. No. 245, 80th Cong., 1st sess., p. 40; 93 Cong. Rec. 3559.

In the *O'Brien* case, this Court held the Michigan cooling-off and majority strike vote provisions invalid for the additional reason that "The federal Act * * * permits strikes at a different and usually earlier time than the Michigan law; and it does not require majority authorization for any strike." 339 U. S., at p. 458. The provisions of the Wisconsin statute here in issue make far deeper inroads upon "federally protected labor rights" (*ibid.*), than did the Michigan Act. The Wisconsin Act does not merely postpone and condition the right to strike for

higher wages; it destroys that right completely.

We have shown above that Congress deliberately chose to preserve the right of employees of public utilities to strike and deliberately rejected compulsory arbitration as a method of resolving disputes over terms and conditions of employment in public utilities, pp. 32–42, *supra*. Nothing in the terms of the Act or its legislative history suggests that despite its rejection of these techniques on the merits Congress nevertheless intended to leave the States free to adopt them. Having refused to apply compulsory techniques even to avoid great hardships to the entire Nation, it can hardly be suggested that Congress authorized their application by the States to avoid lesser hardships to local communities. And it is noteworthy that a large majority of the States apparently agree with Congress that measures such as these are neither desirable nor necessary to protect the public interest, for only a minority have enacted legislation outlawing strikes and providing for compulsory arbitration in public utilities.[23]

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[23] Only six states in addition to Wisconsin have adopted laws providing for compulsory arbitration of public utility disputes. Florida: *Fla. Stat. Ann.* (Supp. 1948) § 453.01 to 453.18; Indiana: *Ind. Ann. Stat.* (Burns Supp. 1949) § 40-2401 to 40-2415; Kansas: *Kan. Gen. Stat. Ann.* (1935) § 44-601 to 44-628; Nebraska: *Neb. Rev. Stat.* (Supp. 1949) § 48-801 to 48-823; New Jersey: *N. J. Stat. Ann.* (Supp. 1950) Tit. 34: C.13B; Pennsylvania: *Pa. Stat. Ann.* (Supp. 1949) Tit. 43, § 215.1 to 215.5.

It is also to be noted that the Wisconsin statute, in establishing standards for arbitrator's awards, in effect redefines, and significantly narrows the subject matter of compulsory collective bargaining under federal law. Thus, in prohibiting the arbitrator from making awards which infringe on "management prereogatives", the Wisconsin Act assures employers that they will not be com-

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Six states provides for seizure of public utilities in the event of labor disputes which threaten interruption of service. Kansas: *Kan. Gen. Stat. Ann.* (1935) § 44.620; Massachusetts: *Mass. Gen. Laws* (Supp. 1948) (C. 150 B §§ 1 to 7; Missouri: *Mo. Rev. Stat. Ann.* (Supp. 1950) § 10178.119; New Jersey: *N. J. Stat. Ann.* (Supp. 1950) 34:C 13B–13; North Dakota: *N. D. Rev. Code* (1943) § 37–0106; Virginia: *Va. Code Ann.* (1950 §§ 40–75 to 40–95.

The coverage of these provisions varies widely. The Kansas statute applies not only to enterprises commonly regarded as "public utilities," but also to the mnaufacture of food and clothing, and the mining or production of fuel. *Kan. Gen. Stat. Ann.* (1935), § 44–603. The North Dakota statute applies to coal mining. *N. D. Rev. Code* (1943), § 37–0106. The Massachusetts Act applies to the production and distribution of food, fuel and hospital or medical services. *Mass. Gen. Laws* (Supp. 1948), C. 150 B, § 2. For a comprehensive survey of the state laws and their provisions see Roberts, *Compulsory Arbitration of Labor Disputes in Public Utilities* (University of Hawaii Industrial Relations Center (March, 1949), 4–22. In a recent article published under the same title, 1 Labor Law Journal (1950), 694, 700, Roberts concludes that "It has still to be proven that those states that have special statutes [governing public utility disputes] are better protected than those that rely almost entirely on voluntary collective bargaining and voluntary arbitration." Roberts also observes that "compulsory arbitration has not eliminated industrial disputes in those countries where it has been applied." (*Ibid.*, p. 704.)

pelled to reach agreement with the representative of their employees, and hence need not bargain with respect to, certain subjects which are matters of mandatory bargaining under federal law. The conflict is illustrated in the instant case by the arbitrator's action on the Union's request that certain types of employees be maintained on various shifts. The Board of Arbitration refused to grant this request on the ground that to do so would interfere with management's prerogative (No. 330, R. 198). Work schedules and hours and composition of shifts have been held by the National Board to be among the subjects on which bargaining is mandatory under the National Act. *American National Insurance Co.*, 89 N. L. R. B., No. 19; *Woodside Cotton Mills*, 21 N. L. R. B. 42, 54, 55; cf. *Wilson & Co.*, 19 N. L. R. B. 990, 999, enforced, 115 F. 2d 759 (C. A. 8). Thus, under national law, in contrast to the state act, the employer could not lawfully have refused to bargain with the Union on such an issue.

Had Congress intended to permit the states to apply to industries within their borders measures which it had rejected it would clearly have provided for reservation of such power to the states. Congress realized that "by the Labor Act Congress preempts the field that the act covers insofar as commerce within the meaning of the act is concerned" (H. Rep. No. 245, on H. R. 3020, p. 44), and consequently it took care

to preserve to the states whatever jurisdiction it desired to permit them to retain. See Section 10 (a). Section 14 (b), which expressly reserves to the states power to prohibit the execution or application of agreements requiring membership in a labor organization as a condition of employment, was enacted because Congress believed that such a "special provision" was necessary "to give to the States a concurrent jurisdiction in respect of closed-shop and other union-security arrangements" (H. Rep. No. 245, on H. R. 3020, 80th Cong., 1st Sess., p. 40). Similarly, because Congress was advised that the effect of requiring dispute notices to be filed only with the Federal Mediation and Conciliation Service would be to exclude state agencies from offering conciliation or mediation services in disputes subject to the Act (Hearings before the Senate Committee on Education and Labor, 80th Cong., 1st Sess., p. 563), Congress specifically provided in Section 8 (d) for the service of notices upon state as well as upon federal agencies, and in Sections 202 (c) and 203 (b) provided for cooperation between the federal and state conciliation authorities.

This is not to say, of course, that the states are precluded from taking any action to avoid or settle strikes in local public utilities or other local industries which may have severe repercussions on the health, safety or welfare of local communities. Nor does this case present the

question whether, where stoppage of essential public utility service endangers the health and safety of local communities, the states may invoke measures not basically inconsistent with the federal statutory scheme. Although in general the federal statute occupies the field of labor relations affecting interstate commerce, we do not contend that Congress meant to bar the states from dealing with every local emergency in view of the lack of any clear manifestation of intention to that effect. See especially Section 206. How far the states should be permitted to go need not be determined here.

Congress in the amended Act recognized the interests of the states in avoiding hardships of this character, and assigned to state and local governments a significant role in seeking to prevent and alleviate such strikes. Congress sought to encourage state and local agencies to participate fully within the framework of national policy in the "settlement of issues between employers and employees through collective bargaining" (Section 201 (b)), by offering conciliation, mediation and voluntary arbitration services to the parties to labor disputes. In defererce to state agencies created for this purpose, Congress instructed the Director of the Federal Mediation and Conciliation Service to "avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other

conciliation services are available to the parties" (Section 203). And to assure that the state agencies would have adequate opportunity for bringing about voluntary settlements, thereby avoiding strikes, Congress in Section 8 (d) required the parties to contract disputes to notify the state agencies thirty days before the contract expires or before a strike is to take place. Pursuant to these provisions, state agencies, like the Federal Mediation and Conciliation Service, are authorized (Section 203 (c)), to "seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lockout, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot." They are not authorized, however, to invoke compulsory measures which Congress regarded as inconsistent with the practice and procedure of collective bargaining, even to avoid emergencies. The basic principle should be that they cannot use means which are inconsistent with federal policy, and certainly not those which Congress has itself specifically rejected for emergency situations. This might mean that the states could adopt for local utility emergencies measures not impeding collective bargaining to a greater extent than those employed by Congress for dealing with national emergencies.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgments below should be reversed.

Respectfully submitted.

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